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August 17, 2005

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REGULATORY COMMISSION

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The Honorable Magalie R. Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: USGen New England, Inc., Project No. 1855-030: "Motion to Substitute Vermont Hydro-electric Power Authority as Co-Applicant Transferee"

Dear Secretary Salas:

On August 10, 2005, Mr. James Hunter of the Commission's Office of the Division of Hydropower Compliance and Administration left a telephone message with Vermont Hydro-electric Power Authority's ("VHPA") counsel stating that the Commission Staff would not process the "Motion to Substitute Vermont Hydro-electric Power Authority as a Co-Applicant Transferee" filed on August 10, 2005 ("*August 10 Motion*" or "*Motion*"), unless the license transferor, TransCanada Hydro Northeast, Inc. ("TC Hydro NE") was a signatory to the *August 10 Motion*. Subsequently, the Commission issued a public notice of the application on August 12, 2005, but rescinded the notice on August 15, 2005.

TC Hydro NE has refused to be a signatory to any motion to substitute VHPA for the Town of Rockingham, Vermont ("Town"), as a co-applicant licensee. The Movants – VHPA, the Town and Bellows Falls Power Company, LLC ("BFPC") – respectfully suggest that a delay in granting the *August 10 Motion* will severely prejudice VHPA's right to acquire the Project pursuant to the Option ("Option Transaction") and could prejudice VHPA's rights in the appropriate legal forum to protect and defend its right to do so.

cc: Mr. Mark Robinson Mr. Hossein Ildari
Mr. Joseph D. Morgan Mr. James Hunter
Mr. Alan Greenbaum All Parties

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I. Introduction

In the *August 10 Motion*, VHPA, the Town and BFPC explained that the pleading was submitted because the Town, which is currently the co-applicant transferee for the Bellows Falls Hydroelectric Project ("Project"), had not yet secured all of the necessary authorizations to demonstrate that it has the legal competence, as required by Section 9(a)(2) of the Federal Power Act ("FPA"),¹ to become a co-licensee of the Project.²

The Movants also explained that on January 26, 2005, USGen New England, Inc. ("USGenNE"), the Town, BFPC and VHPA filed an application for transfer of the Project license from USGenNE to BFPC and the Town as joint licensees, and for approval of VHPA's plan to take title to the property and transfer it to the Town as part of the closing on the acquisition from USGenNE ("*January 26 Application*").³

TC Hydro NE was not an applicant on the *January 26 Application*. Until April 1, 2005, when USGenNE closed on the sale of several hydroelectric facilities to TC Hydro NE ("TC Hydro Transaction"), USGenNE was the owner, operator, and licensee of the Project.⁴ TC Hydro NE acquired the Project from USGenNE subject to an Option to Purchase ("Option") held by the Town. On May 24, 2005, USGenNE and the parties filed a motion to substitute TC Hydro NE for USGenNE as the transferor of the Project ("*May 24 Motion*"). The *January 26 Application* is still pending before the Commission, with TC Hydro NE as the transferor applicant.

The Movants also explained that on December 7, 2004, the Town assigned the Option to VHPA, as described in the *January 26 Application*, and the Option was properly exercised, including the purchase price of \$72,046,000 being deposited into an escrow account. Upon closing on the purchase of the Project pursuant to the

¹ 16 U.S.C. § 802(a)(2).

² See the *August 10 Motion* at pp. 1 and 4.

³ *USGen New England, Inc., et al.*, "Application for Transfer of License and Approval of Financing Arrangement," Project No. 1855-030 (January 26, 2005).

⁴ The transfer of the license for the Project from USGenNE to TC Hydro NE was approved by the Commission in *USGen New England, Inc., et al.*, 110 FERC ¶ 62,052 (January 24, 2005).

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Option, VHPA will take title to the Project and the escrow will be released to TC Hydro NE. Section 5 of the Option provides a condition precedent for the governmental approvals to be in place by September 11, 2005.

As explained in the *August 10 Motion*, the Town, VHPA and BFPC entered into a Master Agreement governing the arrangements among them both before and after VHPA acquires the Project from TC Hydro NE under the Option. In the main contemplated transaction under the Master Agreement (a copy of which was provided in the *January 26 Application*), upon closing of the Option Transaction, VHPA would transfer title to the Project to the Town. TC Hydro NE is not a party to the Master Agreement, which governs events that will take place after closing on the Option.

The Master Agreement also provides that, in the event that the Town is unable to assume VHPA's interests in the Project, VHPA and BFPC could consummate the Master Agreement Transaction. Section 2.12(a) of the Master Agreement states:

In the event that the Town does not for any reason, within one Business Day of the Closing, assume all of the VHPA's interest in the Facility Lease and accept a transfer of all VHPA's interest in the Property (provided that the VHPA has provided written notice to the Town at least ten days prior to the Closing), the VHPA shall have the right to sell to the Company, and the Company shall have the right to Purchase from the VHPA, for one dollar, all of the VHPA's interest in the Facility Lease and the Property by following the procedures specified in Section 2.12(c).

Section 2.12(a) was included in the Master Agreement to ensure that VHPA could close the Option Transaction if the Town did not, for any reason, close on the Project by the closing date established in the Option.

In the *August 10 Motion*, the Movants informed the Commission that TC Hydro NE had been apprised that the *Motion* would be submitted to the Commission.⁵ The

⁵ *August 10 Motion* at p. 9.

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Movants did invite TC Hydro NE to join the *Motion*, but on August 10, 2005, TC Hydro NE's representatives informed VHPA and BFPC, that it would, in fact, not join in a motion to substitute VHPA for the Town as a co-licensee applicant.

II. Commission Failure to Act Will Extinguish a Legal Right Best Decided in the Appropriate Judicial Forum, Not Inadvertently by the Commission

Due to the fact that there is a September 11, 2005 deadline by which all of the regulatory approvals must be in place before the Option Transaction can be consummated, the Movants were forced to file the *August 10 Motion* in order to ensure that VHPA's right to consummate the Option Transaction is not extinguished by the failure to obtain the necessary regulatory approvals.

Whether VHPA has the right to consummate the Option may be contested by TC Hydro NE. However, if that is the case, the issue is a contract dispute best solved by the appropriate judicial forum, not inadvertently by the Commission's delay or failure to act on the *Motion*. The Commission's failure to at least begin the processing of the Motion and to act on the Motion by September 9, 2005, could effectively extinguish the Option. Section 5 of the Option contains a "Governmental Approval Condition Precedent" which requires that:

In the event that Optionor [TC Hydro NE] has not received all governmental approvals in final nonappealable form within two hundred seventy (270) days from the Application Date ("Governmental Approval Condition Precedent"), Optionor shall have the right to terminate this Agreement by written notice to Optionee [VHPA] in which event the Deposit shall be returned to Optionee, all obligations of the parties hereto shall cease and this Agreement shall be void and without recourse to the parties hereto;

The 270-day period will expire on September 11, 2005.⁶

⁶ It should be noted that under Section 5 of the Option, if the governmental approvals are in place by the 270-day deadline, but remain subject to judicial review, VHPA can waive the Governmental Approval Condition:

(Footnote Continued...)

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III. There is No Bar to the Commission Acting on and Granting the *Motion*

The Movants recognize that not having the transferor as a signatory on a motion to substitute one co-applicant transferee for another may be an unusual situation. However, the gist of the facts are that: (1) TC Hydro NE purchased the Project subject to the Option, and (2) the Option was assigned to VHPA and the assignment was approved by the pertinent judicial forum, a Federal U.S. bankruptcy court exercising jurisdiction over the USGenNE bankruptcy.

First, TC Hydro NE clearly purchased the Project subject to the Option. Section 12.3 of the Option provides:

In the event that any such sale or transfer of the Property is to take place while this Agreement is still outstanding and in effect, such sale or transfer shall be made subject to the terms of this Agreement.

Second, the Option was legally assigned to VHPA, such assignment having been approved by the United States Bankruptcy Court for the District of Maryland, Greenbelt Division ("Bankruptcy Court"). Over TC Hydro NE's objections, the Bankruptcy Court granted the Town the right to assign the Option to VHPA rather than to the Vermont Public Power Supply Authority, as originally contemplated. That order states in pertinent part:

ORDERED that (i) the substitution of the Vermont HydroElectric Power Authority ("VHPA") for the Vermont Public Power Supply Authority in the Option To Purchase between the Debtor and the Town which concerns the Debtor's Bellows Falls Project and is attached to the Consent Decree And Order dated July 23, 2004 [Dkt. No. 974] (the

(Footnote Continued...)

"[P]rovided that: (i) all governmental approvals have been received and are final and effective but one or more of such approvals remain subject to judicial review and (ii) Optionee [VHPA] agrees pursuant to this clause (ii) to indemnify and hold harmless Optionor [TC Hydro NE], and Optionor's officers, directors and shareholder from any and all liabilities, losses, costs, damages and expenses, including reasonable attorneys fees, suffered by Optionor as a result of Optionee's having proceeded to a Closing without waiting for the expiration of all possible judicial appeals"

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"Option") does not constitute a material modification of the Option, (ii) that the Town may, if need be, assign the Option Agreement to VHPA for the purposes set forth in the Option, and (iii) TC's consent to such modification is not required under, and the forgoing substitution and/or assignment shall not constitute a breach of, the Asset Purchase and Sale Agreement dated as of September 29, 2004 between the Debtor, USG Services, LLC, and TC; and it is further

ORDERED that any and all other relief requested in the Motion is denied as against the Debtor and/or TC.⁷

TC Hydro NE may not agree with the new proposed arrangements that will take place under the Master Agreement – to which it is not a party – but that does not thwart the fact that the appropriate legal forum, a U.S. bankruptcy court, approved the assignment of the Option from the Town to the VHPA and that TC Hydro NE purchased the Project subject to the Option. Allowing TC Hydro NE's refusal to co-sign a motion to substitute to stop or delay transfer of the license for the Project will in essence give TC Hydro NE the right to extinguish the Option. The Commission should not do that.

This is not a case in which a proposed transferee files an application to transfer a license without the agreement of the transferor, as was the case in *Town of Stuyvesant and Niagara Mohawk Power Corp.*⁸ Here the transferor, TC Hydro NE, specifically purchased a hydroelectric project subject to an option involving the proposed transferee, VHPA. In this case, there is simply a "reluctant" transferor that refuses to co-sign an amendment to a transfer application because the amendment's failure will ensure that a much needed regulatory approval condition precedent

⁷ *In re: USGen New England, Inc.*, "Order on Emergency Motion of Town of Rockingham, Vermont for Enforcement and/or Clarification of Prior Orders," Case No. 03-30465 (PM), date signed November 23, 2004.

⁸ *Town of Stuyvesant and Niagara Mohawk Power Corp.*, unpublished Order of the Director of the Office of Hydropower Licensing issued in Docket No. P-2696-011 (June 11, 1999); *order denying rehearing on other grounds, Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,003 (1999).

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cannot be met for closing. If the gambit works, TC Hydro NE may succeed in keeping the Project.

The Movants submit that TC Hydro NE's signature on the *May 24 Motion* gives the Commission sufficient authority to grant the *August 10 Motion* without TC Hydro NE's consent. The Commission has found flexibility when needed in acting on transfer applications. Recently, the Commission deemed an entity a transferor applicant where there was a merger involving a co-licensee and after the merger, the original co-licensee no longer existed. In that case, General Electric Credit Corporation was merged into General Electric Capital Corporation, and there was no timely application for partial transfer of license. The Commission stated: "Based on the facts of this case, after-the-fact approval of the merger/transfer is granted, and General Electric Capital Corporation is treated as a co-applicant here."⁹

The Movants also submit that the Commission can, in the alternative, treat the entire license transfer proceeding as one of the "involuntary" transfers permitted under Section 8 of the FPA. Section 8 provides in pertinent part:

[N]o voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license . . . *Provided*, [t]hat a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.¹⁰

A bankruptcy court, as part of a judicial sale, approved assignment of the Option to VHPA, over TC Hydro NE's objections. On this basis, TC Hydro NE's objection to VHPA becoming a co-applicant transferee on the transfer application should not need TC Hydro NE's consent.

⁹ *Boott Hydropower, Inc., et al.*, 111 FERC ¶ 62,001 (2005).

¹⁰ 16 U.S.C. § 801.



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The Movants respectfully request that the Commission approve the *August 10 Motion* and issue an order approving the transfer of the license from TC Hydro NE to VHPA and BFPC, as joint licensees by September 9, 2005.

If you have any questions, please do not hesitate to contact any of the following:

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Very truly yours,

A handwritten signature in cursive script, appearing to read "Amy S. Koch", written over a horizontal line.

Amy S. Koch
On behalf of the Movants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served this day by first class United States mail, postage prepaid, or electronically, as designated on the official service list, to all parties listed on the official service list compiled by the Secretary for this proceeding.

Dated at Washington, D.C., this 17th day of August, 2005.


Jennifer Lokenvitz Schwitzer